

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0221

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 8, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 101525). Claimant filed a timely request for hearing. On February 4, 2019, ALJ Snyder conducted a hearing, and on February 8, 2019 issued Order No. 19-UI-124350, affirming the Department's decision. On February 27, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Anniebam Landscape Solutions LLC employed claimant as a gardener from June 26, 2018 until December 5, 2018.

(2) The employer expected claimant to report on time for work and to notify it if he was going to arrive more than five minutes late. Claimant understood the employer's expectations.

(3) During his employment, claimant often reported to work ten to fifteen minutes late, without calling his foreman or another employer representative. In July 2018 and again in September 2018, the owner verbally warned claimant about being late and failing to give notice. Despite these warnings, claimant continued to report late for work without providing notice. In October 2018, the owner met with claimant and discussed with him his "chronic tardiness." Audio at ~13:26. At that time, the owner told claimant that if he continued to be late for work without giving notice, he could be discharged.

(4) During the Thanksgiving holiday in late November 2018, the owner was not at the job site. When the owner returned, the foreman told her that claimant had consistently reported ten to twenty minutes late when she was away from the site.

(5) On December 4, 2018, claimant reported around fifteen minutes late for work. Claimant did not notify the employer that he was going to be late. Also on December 4, claimant left the job site for lunch. Claimant had a thirty-minute break for lunch. Claimant did not return to the job site from his lunch break for an hour and a half to two hours. Claimant did not notify the employer that he was going to be returning late from lunch.

(6) On December 5, 2018, the owner discharged claimant for not notifying the employer that he would return late from lunch on December 4.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Before December 4, claimant had received three warnings about arriving late for work and not notifying the employer. Claimant knew or should have known on December 4 that the employer expected him to give notice that he was going to return to work at least an hour late from lunch. Although claimant explained that he was occupied during his lunch trying to deal with what turned out to be a hoax involving a call from a purported IRS agent allegedly demanding an immediate tax payment, in the course of that lunch claimant spoke by cell phone with both his father and his aunt and visited a bank. Assuming the accuracy of claimant's account, it appears that he had the time to, and could have, called the foreman or another employer representative to provide notice that he was going to be late returning from lunch. Claimant was or should have been aware of the employer's expectation that he call in if he was going to be late returning from lunch. By failing to call the employer, he demonstrated an indifference to the consequences of his inaction. Claimant knew or should have known that his failure to act would probably violate the employer's standards. Claimant's failure to notify the employer on December 4 that he was going to be late in returning from lunch was a wantonly negligent violation of the employer's standards.

Claimant's wantonly negligent behavior on December 4, his failure to notify the employer that he was going to be late in returning from lunch, may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be considered an "isolated instance of poor judgment" if, among other things, it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A).

Claimant did not deny that on December 4 he was more than five minutes late arriving to work and did not suggest that he notified the employer. Claimant defended his failure to call and notify the employer because he allegedly was delayed by traffic and it was not safe for him to use cell phone while driving. Audio at ~23:20. However, given the three warnings that the employer had issued to claimant for the same behavior, it showed conscious indifference that, when claimant realized he was going to be more than five minutes late on December 4, he did not pull over his car to the side of the road and call the

employer. Claimant's behavior in not doing so likely was a wantonly negligent violation of the employer's standards.

With respect to claimant's tardy arrivals before December 4, while claimant generally contended that the testimony of the employer's witness that he was regularly late was "exaggerated," it was notable that he did not deny that he frequently reported more than five minutes late and did not notify the employer. Audio at ~23:32, ~24:47. In addition, claimant's suggestion that the owner, who was the employer's witness, was not capable of gauging if he was late because the foreman had a "very flexible" start time does not seem plausible since it was the foreman who informed the owner that claimant was "consistently" late. It is not likely that the foreman would have reported claimant's tardiness to the owner if claimant's starting time was so variable. Audio at ~26:01. Finally, even accepting claimant's testimony that his lateness was due to unforeseen traffic delays, for the reasons discussed above, this reasonably would not excuse his failure to pull over his car and call the employer to give notice that he was going to be late. On many occasions before the final incident on December 4, the preponderance of the evidence shows that claimant wantonly violated the employer's standards by reporting for work more than five minutes late without notifying the employer. Because claimant's wantonly negligent violation of the employer's standards on December 4 was neither single nor infrequent, it may not be excused from constituting misconduct as an isolated instance of poor judgment.

Nor on this record was claimant's wantonly negligent behavior on December 4 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend or show that he failed to notify the employer that he was returning late from lunch on December 4 due to misunderstanding of the employer's standards, or because he thought that the employer would excuse his tardy return. There is insufficient evidence in the record to show that claimant's behavior on December 4 was the result of a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-124350 is affirmed.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: March 29, 2019

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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